

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID SMITH,

Defendant-Appellant.

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UNPUBLISHED

July 30, 2013

No. 306670

Wayne Circuit Court

LC No. 11-005273-FH

Before: GLEICHER, P.J., and BECKERING and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions for felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to five years' probation for the felonious assault conviction, and a two-year term of imprisonment for the felony-firearm conviction. We affirm because there was no prosecutorial misconduct.

Defendant's convictions arise from an incident in which he and his sister went to the home of their brother's former girlfriend and assaulted the woman's niece. The victim ran away after defendant's sister pointed a gun at her. While she was running, she heard gunshots. The victim's boyfriend testified that defendant fired the shots at the fleeing victim.

Defendant's sole claim on appeal is that misconduct by the prosecutor denied him a fair trial. Because defendant did not object to the prosecutor's conduct at trial, this issue is not preserved. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Accordingly, our review is limited to plain error affecting defendant's substantial rights. *People v Goodin*, 257 Mich App 425, 431; 668 NW2d 392 (2003). If a plain error is found, reversal is not warranted unless the error resulted in the conviction of an actually innocent person or the error seriously affected the fairness, integrity, or public reputation of the proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

"The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial (i.e., whether prejudice resulted)." *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). The reviewing court must examine the prosecutor's remarks in context on a case-by-case basis. *Id.* at 272-273. The prosecutor's comments are evaluated in light of defendant's arguments and the relationship they bear to the evidence. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). The propriety of a prosecutor's remarks depends on all the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

The prosecutor may argue the evidence and all reasonable inferences arising from the evidence as it relates to her theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). The prosecutor cannot “argue facts not in evidence or mischaracterize the evidence presented[.]” *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001). The prosecutor also may not express a personal opinion regarding the defendant’s guilt. *Bahoda*, 448 Mich at 282-283. Nor may the prosecutor “vouch for the credibility of his witness to the effect that he has some special knowledge concerning a witness’ truthfulness.” *Id.* at 276. The prosecutor should not “impugn the integrity of the defendant’s experts.” *People v Unger*, 278 Mich App 210, 240; 749 NW2d 272 (2008).

The prosecutor did not argue facts not in evidence when she stated that the victim described defendant’s sister’s weapon as “a small black handgun.” This was a reasonable inference drawn from the victim’s testimony that the gun “was black” and “wasn’t long.” In any event, any misstatement regarding the size of defendant’s sister’s gun could not have prejudiced defendant, whose convictions were based on his own possession and use of another gun.

Although no scientific evidence was presented, defendant complains that the prosecutor engaged in misconduct by “demean[ing] the value of scientific evidence.” In its preliminary statements to the jury venire, the trial court cautioned that the prospective jurors should not expect the case to resemble those seen in television dramas and stated, “Scientific evidence in the real world, not fiction, is seldom if ever available, let alone [sic] presented as evidence.” In her closing arguments, the prosecutor referenced the trial court’s preliminary remarks, telling the jury that this case was not a television drama like *CSI* or *Law and Order*, but rather was “real life.” She never mentioned scientific evidence or said anything to indicate that such evidence was immaterial and unnecessary. At most, she implied that the case could not be neatly resolved by the use of scientific evidence as often happens on televised dramas. Viewed in context, there is no basis for concluding that the prosecutor’s comments were improper. Further, defendant has not explained how the comments prejudiced his rights in this case.

Finally, defendant contends that the prosecutor improperly interjected her personal opinion into the case and vouched for her witnesses. We disagree. The prosecutor’s remarks regarding the victim’s boyfriend were tied to the evidence. She argued that his actions and the fact that he did not have a gun were inconsistent with him being the shooter and falsely blaming defendant. In stating that the victim was “honest with you,” the prosecutor was not stating that she personally knew that the victim had testified truthfully. The prosecutor’s remarks, viewed in context, indicated that the victim had admitted to her own participation and lack of good judgment in the incident. Further, the prosecutor went on to remind the jurors that it was their duty to determine which witnesses they believed. Defendant has failed to demonstrate any error, plain or otherwise.

Affirmed.

/s/ Elizabeth L. Gleicher  
/s/ Jane M. Beckering  
/s/ Douglas B. Shapiro